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No. 80-5392

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ROBERT HOWE, SR., PETITIONER

v.

BENJAMIN CIVILETTI, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL RESPONDENTS

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The facts of this case are set out in our Brief for the Federal Respondents filed with the Court on November 4, 1980. Petitioner seeks review of a decision of the United States Court of Appeals for the Second Circuit affirming the denial of injunctive relief to prevent his transfer from a Vermont state prison to a federal prison pursuant to a contract entered into between the United States and the State of Vermont under 18 U.S.C. 5003(a). Specifically, he contends that the transfer provisions of Section 5003 are applicable only upon a showing that he needs and there exists a specialized treatment program that is available in the federal prison system and not available within the state prison system.

As discussed in our initial brief (at 5-6), there is a conflict among the courts of appeals on the issue presented by this case. On the one hand, both the court of appeals in this

case[1] and the First Circuit in Sisbarro v. Warden, 592 F.2d 1, 4, cert. denied, 444 U.S. 849 (1979), have rejected the claim that Section 5003 places any substantive restrictions on the purposes for which state prisoners may be transferred to federal facilities and, accordingly, have imposed no procedural prerequisites on such transfers. This position recently was adopted by the Third Circuit as well. Beshaw v. Fenton, No. 79-1777 (Dec. 15, 1980). In Lono v. Fenton, 581 F.2d 645 (1978), on the other hand, the en banc Seventh Circuit held that 18 U.S.C. 5003 conditions the authority of federal officials to accept custody of state prisoners on a showing that the prisoners are in need of specialized treatment available only in the federal prison system.

At the time we filed our initial response to the petition, the issue was again before the Seventh Circuit in McKay v. Wilkinson, No. 79-2364, and 11 consolidated cases. Because the en banc court of appeals had been closely divided in Lono and no court outside the jurisdiction of the Seventh Circuit had followed Lono, there seemed to be a realistic possibility that Lono might be overruled. We accordingly suggested that this Court hold the present petition pending the Seventh Circuit's decision in McKay v. Wilkinson, because that decision might eliminate the conflict, in which case there would be no need for this Court's intervention.

On December 23, 1980, the Seventh Circuit decided the pending appeals (sub. nom. Anthony v. Wilkinson, Nos. 79-2362

1/ The opinion in the present case has now been reported. 624 F.2d 454.

et al.).[2] For the most part, the court adhered to the view in Lono that Section 5003 "requires a showing of a state prisoner's need for specialized treatment as a condition precedent to transfer to the federal prison system" (slip op. 11), observing that "principles of stare decisis make it quite undesirable for us to reconsider here the legal propositions announced in Lono" (slip op. 13). While recognizing (slip op. 13) that transfers based on security considerations may satisfy the "specialized treatment" requirement of Lono "if a sufficient array of [therapeutic or rehabilitative] programs is provided in connection with incarceration in a maximum security prison,"[3] the court nonetheless held that the transfers at issue in those appeals were impermissible because the prisoners had not been accorded due process.[4] Contrasting the discretionary transfer of prisoners within a particular system upheld by this Court in Meachum v. Fano, 427 U.S. 215 (1976), and Montanye v. Haymes, 427 U.S. 236 (1976), with the state-to-federal transfer authorized by 18 U.S.C. 5003, the court in Anthony found (slip op. 21) that Section 5003 creates in state prisoners "a liberty interest deserving of due process protection." Accordingly, the court held that "there must be a federally conducted hearing" (slip op. at 27-29) accompanied by the same panoply of procedural protections that is required in parole revocation hearings (see Morrisey v. Brewer, 408 U.S.

2/ By letter dated December 31, 1980, we advised the Court of this development and supplied it with copies of the Seventh Circuit's opinion.

3/ Although we suggested in our initial brief (at 6 n.8) that such a limitation on Lono might eliminate the conflict between it and the present case, in light of the procedural requirements imposed by the Seventh Circuit in Anthony (see infra), a substantial conflict remains.

4/ In Lono, the court had found it unnecessary to decide what process was due a state prisoner prior to his transfer to the federal system (581 F.2d at 646).

471, 489 (1972)) in order to determine "the need for specialized treatment and how it could be met in the federal system" (slip op. 26).5/

While the latest Seventh Circuit decision appears to represent some modification of its prior outright rejection of security needs as a justification for transfer under Section 5003, that court continues to read the statute as being significantly conditioned upon the need for and provision of specialized treatment in the federal facilities. Its approach thus continues to conflict with the interpretation given to the same statute by the First, Second and Third Circuits. Indeed, the conflict among the circuits is enhanced by the addition of new procedural requirements by the Seventh Circuit not imposed by the others.

This is an area in which a uniform national rule is important. The latest decision of the Seventh Circuit leaves the subject governed by inconsistent and conflicting rules. Accordingly, it is our position that the issue of the proper construction of 18 U.S.C. 5003 now requires resolution by this Court.

5/ Petitioner, like most of the prisoners whose cases were resolved in Anthony, was afforded a hearing by state prison officials prior to his transfer to federal custody (see Pet. App. B112-B113; slip op. 5-9 & nn.5-9). Under Anthony, such state hearings alone are insufficient to provide the process that is due. The Seventh Circuit apparently would approve, however, either a bifurcated or a joint procedure whereby state officials would make an initial determination regarding the need of a particular inmate for specialized treatment unavailable in the state of conviction, which determination could be affirmed by the federal officials, who would then go on to determine whether there were federal facilities that would satisfy the inmate's need (slip op. 29-30).

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

WADE H. McCREE, JR.
Solicitor General

JANUARY 1981